IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE
AND
BRIEF AMICUS CURIAE OF
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.
AND THE
OGLALA SIOUX TRIBE
OF THE PINE RIDGE RESERVATION, SOUTH DAKOTA
IN SUPPORT OF THE PETITION FOR CERTIORARI

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Attorney for Amici Curiae.

Of Counsel:
W. RICHARD WEST, JR.

Washington, D.C. • THIEL PRESS • (202) 638-4521

SUBJECT MATTER INDEX TO BRIEF

TABLE OF AUTHORITIES

MOTION

Cases:

Statutes:

BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, and the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota, move the Court for leave to file the attached brief *amici curiae* in support of the Petition for Certiorari in the above-encaptioned case. The petitioner Rosebud Sioux Tribe has consented to the filing of this brief; the respondents, the Honorable Richard Kneip, et al., have refused so to consent.

The Association on American Indian Affairs, Inc. is a nonprofit membership corporation organized under the

laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *De Coteau v. District County Court,* 420 U.S. 425, 43 L.Ed.2d 300 (1975), and the filing of *amicus curiae* briefs in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 36 L.Ed.2d 114 (1973), *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 31 L.Ed.2d 741 (1972), *Puyallup Tribe v. Dept. of Game,* 391 U.S. 392, 20 L.Ed.2d 689 (1968), and *Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S. 685, 14 L.Ed.2d 165 (1965).

The Oglala Sioux Tribe is a federally recognized Indian Tribe which governs its members on a reservation that in part has been opened under a federal statute to settlement by non-Indians. *See* Act of May 10, 1910, ch. 257, 36 Stat. 440. Without exception those areas previously opened to settlement have been recognized and consistently administered by the federal government and the Tribe as part of the Pine Ridge Indian Reservation.

This case presents a general issue of great and continuing concern to the Association, to the Oglala Sioux Tribe, and to all American Indians—whether certain so-called "surplus lands" statutes which were unilaterally enacted by Congress at the turn of the twentieth century without the consent of the affected Indian tribes, and which opened all or parts of the tribes' reservations to settlement by non-Indians, effected a termination of reservation status. In the present case, the

Association and the Oglala Sioux Tribe are concerned with this broad question in a specific context—namely, whether the Acts of April 23, 1904, March 2, 1907, and May 30, 1910, which were enacted without the consent of petitioner, and in which Congress explicitly declared that the United States was not purchasing the lands opened to settlement, effected a termination of the reservation status of three-fourths of the Rosebud Indian Reservation. Moreover, in reliance upon its decision in this case, the court below recently has held that the Act of May 10, 1910, *supra,* which opened the Bennett County portion of the Pine Ridge Indian Reservation to settlement, also effected a termination of reservation status. *See United States ex rel. Cook v. Parkinson,* No. 75-1306 (8 Cir. 1975) (slip opinion of October 29, 1975), at 7.

The Association and the Oglala Sioux Tribe submit the attached brief in order to assist the Court in recognizing that the decision of the United States Court of Appeals for the Eighth Circuit clearly contravenes the precedents established by this Court which support the proposition that statutes unilaterally enacted by Congress opening an Indian reservation to settlement by non-Indians do not disestablish the reservation. Since the immediate parties are not likely to address the specific points which the Association and the Tribe propose to discuss, and since such discussion thus may be helpful to the Court, the Association and the Tribe request that their motion for leave to file the attached brief as *amici curiae* be granted.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Attorney for Amici Curiae.

Of Counsel:
W. RICHARD WEST, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,

Respondents.

BRIEF AMICUS CURIAE OF
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.
AND THE
OGLALA SIOUX TRIBE OF THE
PINE RIDGE RESERVATION, SOUTH DAKOTA
IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF AMICI CURIAE

The Association on American Indian Affairs, Inc. is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-

wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Oglala Sioux Tribe is a federally recognized Indian tribe which governs the Pine Ridge Indian Reservation in the State of South Dakota.

This case presents a question of great and continuing concern to the Association, and to the Oglala Sioux Tribe and all other American Indians—whether certain so-called "surplus lands" statutes which were unilaterally enacted by Congress at the turn of the twentieth century without the consent of the affected Indian tribes and which opened all or parts of the tribes' reservations to settlement by non-Indians, effected a termination of reservation status. In the present case, the Association and the Tribe are concerned with this broad issue in a specific context—namely, whether the Acts of April 23, 1904, March 2, 1907, and May 30, 1910, which were enacted without the consent of petitioner, and in which Congress explicitly declared that the United States was not purchasing the lands opened to settlement, effected a termination of the reservation status of three-fourths of the Rosebud Indian Reservation.

In terms of its potential impact on American Indians, the importance of this question can hardly be overstated. At the present time seventeen Indian reservations with a population of approximately 69,000 are subject to acts of Congress which unilaterally opened certain reservation lands to settlement by non-Indians.[1] Without exception

[1] *See* Act of May 30, 1910, ch. 260, 36 Stat. 448; Act of May 27, 1910, ch. 257, 36 Stat. 440; Act of May 30, 1908, ch. 237, 35 Stat. 558; Act of May 29, 1908, ch. 218, 35 Stat. 460; Act of May 29, 1908, ch. 217, 35 Stat. 458; Act of March 2, 1907, ch. 2536, 34 Stat. 1230; Act of March 2, 1907, ch. 2285, 34 Stat. 1035; Act

[footnote continued]

the areas opened to such settlement nevertheless have been recognized as Indian country by Congress and have been consistently administered as reservation lands by the Department of the Interior.[2]

If the Court of Appeals' decision in this case is upheld, the ultimate effect of the holding on Indian tribes and their members will be nothing short of a political and cultural revolution. The exclusive jurisdiction of the federal government over Indians who reside on reservation areas which have been opened by Congress to settlement by non-Indians will be terminated. Furthermore, the authority of Indian tribes to exercise traditional powers of self-government over a significant part of their membership will be severely curtailed or entirely eliminated. Finally, for jurisdictional purposes, Indians residing on reservation lands opened to settlement will be left to the mercy of the States, which on a previous occasion this Court quite aptly has characterized as "their deadliest enemies." *United States v. Kagama,* 118 U.S. 375, 384, 30 L.Ed.228, 231 (1886).

The Association and the Oglala Sioux Tribe submit the following brief in order to assist the Court in recognizing that the decision of the United States Court of Appeals

of June 21, 1906, ch. 3504, 34 Stat. 334; Act of April 21, 1906, ch. 1645, 34 Stat. 124; Act of March 3, 1905, ch. 1452, 35 Stat. 458; Act of December 21, 1904, ch. 22, 33 Stat. 595; Act of April 28, 1904, ch. 1820, 33 Stat. 567; Act of April 27, 1904, ch. 1624, 33 Stat. 352; Act of April 27, 1904, ch. 1620, 33 Stat. 319; Act of April 23, 1904, ch. 1495, 33 Stat. 302; Act of April 23, 1904, ch. 1484, 33 Stat. 254; Act of February 20, 1904, ch. 161, 33 Stat. 46.

[2] The Secretary of the Interior's determination that such areas retain their reservation status is entitled to "great deference." *See Udall v. Tallman,* 380 U.S. 1, 16, 13 L.Ed.2d 616, 625 (1965).

for the Eighth Circuit clearly contravenes the long line of precedents established by this Court which support the proposition that statutes unilaterally enacted by Congress opening an Indian reservation to settlement by non-Indians do not disestablish the reservation.

STATEMENT OF THE CASE

Petitioner, the Rosebud Sioux Tribe, is a constituent part of the Sioux Nation, which, as early as 1851, was recognized by the United States as the owner of a vast domain in what are now the States of North Dakota, South Dakota, Nebraska, Montana, and Wyoming. *See Sioux Tribe v. United States,* 500 F.2d 458, 460 (Ct. Cl. 1974). Pursuant to the provisions of a treaty entered into on April 29, 1868, the United States "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation the Great Sioux Reservation, which embraced approximately 28 million acres of land west of the Missouri River in the Territory of Dakota. Treaty of April 29, 1868, 15 Stat. 635, 636. Article II of the 1868 Treaty expressly guaranteed that no persons except authorized officials of the federal government would be "permitted to pass over, settle upon or reside" on the Reservation. Treaty of April 29, 1868, 15 Stat. at 636. Finally, the 1868 Treaty provided in Article XII that a sale of any part of the Reservation would not be "of any validity" absent the written consent of three-fourths of the male adults of the Sioux Nation. Treaty of April 29, 1868, 15 Stat. at 639.

During the next forty years the United States repeatedly demonstrated a singular inability to abide by the promises made to the Sioux Nation in 1868. Within a decade after the 1868 Treaty became effective, non-Indians initiated a persistent and ultimately effective

campaign to convince the federal government to reduce further the Sioux Nation's territory. In capitulation to such pressures, the United States in 1877 acquired unilaterally and without the Sioux Nation's consent approximately 7.5 million acres of the Black Hills portion of the Reservation, which contained substantial gold deposits. *See* Act of February 28, 1877, ch. 72, 19 Stat. 254; *Sioux Tribe v. United States,* 97 Ct. Cl. 613, 655-56 (1942).

In 1889 Congress enacted legislation which effected yet another reduction in the Sioux Nation's reservation. Pursuant to the Act of March 2, 1889, the provisions of which had been assented to by three-fourths of the male adults of the Sioux Nation, the United States restored half of the Great Sioux Reservation to the public domain, and divided the balance into six separate reservations. *See* Act of March 2, 1889, ch. 405, §§1-6, 21, 25 Stat. 888, 889-90, 897-98. Section 2 of the 1889 Act established a permanent reservation for the Rosebud Sioux Tribe which included all or parts of the counties of Todd, Mellette, Tripp, and Gregory in the State of South Dakota. *See* Act of March 2, 1889, ch. 405, §2, 25 Stat. at 888. Section 19 extended to the reservation thus created all provisions of the 1868 Treaty not in conflict with the 1889 Act, including the promise of absolute and undisturbed use and occupancy, the assurance that all outsiders except for authorized federal employees would be barred, and the requirement that no reservation land would be sold without the written consent of three-fourths of the male adults. *See* Act of March 2, 1889, ch. 405, §19, 25 Stat. at 896.

During the first decade of the twentieth century, Congress enacted unilaterally and without the consent of the Rosebud Sioux Tribe three so-called "surplus" land

statutes which opened large parts of the Rosebud Reservation to settlement by non-Indians. *See* Act of May 30, 1910, ch. 260, 36 Stat. 448; Act of March 2, 1907, ch. 2536, 34 Stat. 1230; Act of April 23, 1904, ch. 1484, 33 Stat. 254. These enactments were labeled "surplus land statutes" because they disposed of land which supposedly was not needed immediately for allotment to individual Indians, and which therefore was deemed by the federal government to be "surplus" to petitioner's needs. Pursuant to the provisions of all three statutes, parts of the Rosebud Reservation were made available to non-Indian settlers for sale, and the proceeds from such sales were credited to petitioner as they were received by the federal government. *See* Act of May 30, 1910, ch. 260, §7, 36 Stat. at 451; Act of March 2, 1907, ch. 2536, §5, 34 Stat. at 1231; Act of April 23, 1904, ch. 1484, 33 Stat. at 256.

The history of the three surplus land statutes affecting the Rosebud Indian Reservation actually commences in 1901 when the federal government dispatched a representative to the Rosebud Sioux Tribe to negotiate an agreement for the cession and sale of approximately 416,000 acres in the Gregory County portion of the reservation established by the 1889 Act. Subsequent negotiations resulted in an agreement pursuant to which petitioner did ". . . cede, surrender, grant, and convey to the United States all [its] claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota. . . ." Agreement of September 14, 1901, 33 Stat. 254. In consideration of the Rosebud Sioux Tribe's cession of lands, the United States agreed to pay petitioner the sum of $1,040,000. *See* Agreement of September 14, 1901, 33 Stat. 254.

Three-fourths of the male adults of the Tribe consented to the agreement. Agreement of September 14, 1901, 33 Stat. at 255.

Article VI of the 1901 Agreement required that it be ratified by Congress, and in 1902, therefore, bills were introduced in the Senate and the House of Representatives to effect ratification. The Senate bill, which, in addition to ratifying the Agreement, provided for free homesteads and the donation of school sections to the State of South Dakota, passed only after it had been objected to vigorously on the ground that public funds should not be used to purchase Indian land which in turn was to be given to homesteaders free of charge. *See generally* S. REPT. NO. 662, 57th Cong., 1st Sess. 1-2 (1902). The House of Representatives ultimately rejected both of the provisions added to the 1901 Agreement by the Senate. *See generally* H. REPT. NO. 2099, 57th Cong., 1st Sess. 1 (1902).

In response to opposition to the 1902 bills, legislation was proposed in 1903 which adopted the "surplus land" format, and provided that petitioner's reservation in Gregory County would be opened for settlement and sale with proceeds from such sales to be credited to the Tribe. *See* S. 7390, 57th Cong., 2d Sess. (1903); H.R. 17467, 57 Cong., 2d Sess. (1903). Although the preambles of the bills set forth the 1901 Agreement approved by petitioner, the "modified Agreement" which followed the enacting clause contained significant substantive changes that transformed the transaction from an outright sale of land for a sum certain into an arrangement pursuant to which the uncertain future proceeds from the sale of land would be expended for the benefit of petitioner as they were received by the United States. *See* generally S. REPT. NO. 3271, 57th Cong., 2d Sess. (1903); H. REPT.

NO. 3839, 57th Cong., 2d Sess. (1903). Both bills, however, did require that the consent of the Rosebud Sioux Tribe to the new statutory approach be obtained. The Senate passed the proposed legislation, but the House declined to act on it. 36 CONG. REC. 2748 (1903).

In the summer of 1903 the federal government sent a representative to the Rosebud Indian Reservation "... for the purpose of negotiating a new agreement ... along the lines proposed in Senate Bill No. 7390. ..." Letter of June 30, 1903, from the Commissioner of Indian Affairs to James McLaughlin, at 1-2. Despite the considerable efforts of the United States' representative to obtain petitioner's acquiescence in such an approach, less than three-fourths of the Sioux Indians of the Rosebud Indian Reservation approved the surplus land format.

The federal government's failure to obtain the requisite consent for the agreement in no way dampened Congress' determination to enact a surplus land statute opening up petitioner's reservation in Gregory County to non-Indian settlement. In January and February, 1904, a committee in the House of Representatives reported out a new bill which employed the surplus land approach, but conspicuously omitted any requirement of consent by petitioner.[3] *See* S. REPT. NO. 651, 58th Cong., 2d Sess. (1904); H. REPT. NO. 443, 58th Cong., 2d Sess. (1904). The proposed legislation became law on April 23, 1904.

---

[3]Congress' hand had been strengthened considerably in early 1903 by this Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 47 L.Ed.299 (1903). There the Court upheld the Constitutional validity of a federal statute which ratified an outright sale of Indian land for a sum certain—despite the fact the requisite three-fourths consent required by an earlier treaty had not been obtained.

In December, 1906, new bills were introduced for the purpose of opening to non-Indian settlement that part of petitioner's reservation which is located in Tripp County, South Dakota. Congress forewent action on the proposed legislation while a representative of the federal government again was dispatched to the Rosebud Indian Reservation to obtain petitioner's consent. 41 Cong. Rec. 3182 (1907). Despite the repeated efforts of the representative to obtain signatures approving the agreement, less than three-fourths of the male adults in fact agreed to Congress' offering. *See* H. REPT. NO. 7613, 59th Cong., 2d Sess. 7 (1907).

Although the United States and petitioner plainly had reached no understanding which complied with applicable consent requirements, the Secretary of the Interior nevertheless recommended legislation to ratify the "agreement". Letter of February 14, 1907, from E. A. Hitchcock, Secretary of the Interior, to Chairman of the House Committee on Indian Affairs, at 4. Congress, however, ignored the executive branch's advice, and promptly enacted a unilateral surplus land statute on March 2, 1907, to "... authorize the sale and disposition of [that] portion of the surplus or unallotted lands in the Rosebud Indian Reservation [located in Tripp County, South Dakota]." Act of March 2, 1907, ch. 2536, 34 Stat. 1230.

In 1908 yet a third surplus land bill was introduced in the Senate to authorize the sale of petitioner's unallotted lands located in Mellette County, South Dakota. *See* S. 7379, 60th Cong., 2d Sess. (1908). The Secretary of the Interior, while not requesting that the consent of petitioner be obtained, nevertheless recommended to Congress that it solicit "... the views of the Indians ... before the bill is finally acted on. ..." S. REPT.

NO. 887, 60th Cong., 2d Sess. 3 (1909). The Senate Committee on Indian Affairs at first explicitly rejected the Secretary's suggestion because "... it would delay the consideration of the matter unduly...." S. REPT. NO. 887, 60th Cong., 2d Sess. 2 (1909). After the Senate failed to act on the proposed legislation, however, a representative of the federal government was instructed to visit the Rosebud Reservation not to obtain the consent of petitioner's members, but to "... take up with the Indians of the Pine Ridge and Rosebud Reservations the matter of opening parts of these reservations to settlement...." Proceedings of Councils held by Inspector McLaughlin with Indians of the Rosebud Indian Reservation, at 2 (April 21, 1909). Despite the repeated threats of the United States' representative that Congress would open Mellette County regardless of petitioner's views, members of the Rosebud Sioux Tribe steadfastly refused to be intimidated, and continued to oppose further sales of their lands. On May 30, 1910, Congress responded by enacting legislation which authorized the "... sale and disposition of a portion of the surplus and unallotted lands in Mellette [County] ... in the Rosebud Indian Reservation...." Act of May 30, 1910, ch. 260, 36 Stat. 448.

Pursuant to the provisions of 28 U.S.C. §2201, petitioner brought an action in the United States District Court for the District of South Dakota seeking a declaratory judgment that the 1904, 1907, and 1910 surplus land acts discussed above did not disestablish any part of the Rosebud Reservation as defined by the Act of March 2, 1889. In a judgment entered on February 15, 1974, the District Court decreed that the statutes "... did extinguish the reservation or 'Indian land' nature of the unallotted surplus lands in [Gregory, Tripp, and

Mellette Counties] by returning them to the public domain, and did diminish the geographical location of the boundaries of the Rosebud Sioux Reservation to coincide with the boundaries of Todd County, South Dakota." *Rosebud Sioux Tribe v. Kneip*, No. Civ. 72-3030 (D.C. S.D. 1974) (judgment entered on February 15, 1974). In an opinion handed down on July 16, 1975, the United States Court of Appeals for the Eighth Circuit upheld the decision of the District Court. *See Rosebud Sioux Tribe v. Kneip*, No. 74-1211 (8 Cir. 1975) (slip opinion of July 16, 1975).

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONTRAVENES AN ESTABLISHED LINE OF CASES IN WHICH THIS COURT HAS HELD THAT STATUTES UNILATERALLY ENACTED BY CONGRESS OPENING AN INDIAN RESERVATION TO SETTLEMENT BY NON-INDIANS DO NOT DISESTABLISH THE RESERVATION.

The decision rendered by the Court of Appeals conflicts with a long line of cases in which this Court has found repeatedly that surplus land statutes such as those involved here did not effect the termination of reservation status. In *Seymour v. Superintendent*, 368 U.S. 351, 7 L.Ed.2d 346 (1962), the Court addressed the question whether a statute enacted by Congress in 1906 diminished for purposes of exclusive federal jurisdiction the boundaries of the Colville Indian Reservation. *Id.* at 355, 7 L.Ed.2d at 349. The statute in question in the *Seymour* case authorized the sale of certain mineral interests and surplus lands of the Colville Indian Tribe, and differed in no important substantive detail from the Congressional enactments at issue in the present case.

After reviewing the 1906 legislation disposing of the Colville Tribe's surplus lands, the Court rejected respond-

ent's contention that the statute had effected a termination of reservation status. The Court emphasized that "[n]owhere in the . . . Act is there to be found any language . . . expressly vacating the South Half of the reservation and restoring the land to the public domain." *Id.* at 355, 7 L.Ed.2d at 349. Furthermore, considerable importance was attached to the fact that both Congress and the Department of the Interior repeatedly had indicated by their actions that they believed the reservation still to be in existence.[4] *Id.* at 356, 7 L.Ed.2d at 350. Finally, the Court emphasized that the opening of an Indian reservation to settlement by non-Indians should not be interpreted to terminate it:

> . . . [I]t seems clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.[5]

---

[4]Since 1868 the Bureau of Indian Affairs of the Department of the Interior without exception has administered the areas in dispute in this case as part of the Rosebud Indian Reservation.

[5]In determining that the Colville Indian Reservation continued to have reservation status, the Court found "significant" the fact that the State of Washington had failed to fulfill the conditions necessary under federal law for assuming jurisdiction over the Colville Tribe. *See Seymour v. Superintendent*, 368 U.S. at 356 n. 12, 7 L.Ed.2d at 350 n. 12. For a decade and a half the United States provided the State of South Dakota with the opportunity to exercise jurisdiction over Indians on the Rosebud Indian Reservation—the lack of the Rosebud Sioux Tribe's consent notwithstanding. In 1961 the people of the State of South Dakota rejected by referendum the attempt of the state legislature to assume such jurisdiction. *See United States ex rel. Condon v. Erickson*, 478 F.2d 684, 685 n. 1 (8 Cir. 1973).

Id. at 356, 7 L.Ed.2d at 349.

In *Mattz v. Arnett*, 412 U.S. 481, 37 L.Ed.2d 92 (1973), this Court reached an identical result on similar facts. There the ". . . narrow question was whether the Klamath Indian Reservation in northern California was terminated by Act of Congress [in 1892] or whether it remains 'Indian country'. . . ." *Id.* at 483, 37 L.Ed.2d at 94. The Congressional enactment at issue in the *Mattz* case opened certain lands belonging to the Klamath Tribe for sale to non-Indians, and further provided that whatever proceeds were derived from such sales would be placed in a fund maintained by the Secretary of the Interior for the maintenance and education of members of the Tribe. *Id.* at 495, 37 L.Ed.2d at 101. That the legislation in the *Mattz* case was a surplus land act identical in all substantive respects to the statutes at issue in this case cannot reasonably be doubted.

In the *Mattz* opinion this Court not only rejected the contention that the opening of an Indian reservation to settlement by non-Indians effected its disestablishment, but, more important, explicitly affirmed the proposition that such action by Congress is fully compatible with continued reservation status:

> *The meaning of . . . terms [opening Indian land to homsteading] is to be ascertained from the overview of the earlier General Allotment Act of 1887. . . .* That Act permitted the President to make allotments of reservation lands and, with tribal consent, to sell surplus lands. *Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.* When all the lands had been allotted and the trust expired, the reservation could be abolished. *Unallotted lands were made available*

> *to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.* . . . Under the 1887 Act, however, the President was not required to open reservation land . . . he merely had the discretion to do so.
>
> In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened. . . .[6] [Emphasis added.]

Id. at 496-97, 37 L.Ed.2d at 101-02. Thus, in light of the legislative purpose of the General Allotment Act of 1887, surplus land statutes opening Indian reservations to settlement by non-Indians may be characterized as a step toward the ultimate disestablishment of such reservations, but they should not be construed as in themselves effecting the termination of reservation status.

In the *Mattz* case the Court also emphasized that a ". . . congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 505, 37 L.Ed.2d at 106. After reviewing the statute in question and its legislative history, the Court concluded that disestablishment had not been intended:

---

[6]The Court cited the Act of May 21, 1908, ch. 218, 35 Stat. 460, as an example of "special legislation" which opened parts of an Indian reservation to settlement, but which did not terminate reservation status. *See Mattz v. Arnett*, 412 U.S. at 497 n. 19, 37 L.Ed.2d at 102 n. 19. The 1908 Act, which authorized the sale of certain lands within the Cheyenne River Indian Reservation and the Standing Rock Indian Reservation to non-Indian settlers, is virtually identical in substance to the surplus land statutes at issue in this case.

> . . . [C]lear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation."

Id. at 504, 37 L.Ed.2d at 106. *Accord, United States v. Celestine*, 215 U.S. 278, 285, 54 L.Ed.195, 197 (1909).

In its recent decision in *De Coteau v. District County Court*, 420 U.S. 425, 43 L.Ed.2d 300 (1975), this Court again has affirmed the legal principles established in the *Seymour* and *Mattz* cases. The Court addressed in the *De Coteau* case the ". . . single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians, was terminated, and returned to the public domain, by the Act of March 3, 1891. . . ." *Id.* at 426-7, 43 L.Ed.2d at 304.

The Court began its analysis by reiterating a number of the legal rules which are employed in determining whether an Indian reservation has been disestablished. The Court observed that it ". . . does not lightly conclude that an Indian reservation has been terminated." *Id.* at 444, 43 L.Ed.2d at 314. It further emphasized that the ". . . congressional intent [to disestablish a reservation] must be clear, to overcome 'the general rule that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith" '." *Id.* at 444, 43 L.Ed.2d at 314. Finally, the Court ". . . stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit." *Id.* at 444, 43 L.Ed.2d at 314.

The Court, however, found that the statute at issue in the *De Coteau* case[7] evinced a clear and undeniable intent to disestablish the Lake Traverse Indian Reservation. The negotiations between the United States and the Sisseton and Wahpeton bands of the Sioux showed that the "... Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *Id.* at 445, 43 L.Ed.2d at 314. Furthermore, the 1891 Act was passed at the same time Congress enacted other statutes which, by the admission of all parties before the Court, had effected a termination of reservation status:

> That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'

Id. at 446, 43 L.Ed.2d at 315. Thus, the Court concluded that the 1891 Act had disestablished the Lake Traverse Indian Reservation.

---

[7]The enactment was not a unilateral surplus lands statute, but instead effected the ratification of a cession agreement to which the Sisseton and Wahpeton Sioux had consented. Under article I of the instrument the band agreed to "... cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians...." Agreement of December 12, 1889, 26 Stat. 989, 1036. Furthermore, article II of the agreement provided that "[i]n consideration of the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay ... the sum of two dollars and fifty cents per acre...." Agreement of December 12, 1889, 26 Stat. at 1036.

In reaching this conclusion, however, the Court took considerable pains to emphasize that the case before it differed markedly from the facts involved in the *Seymour* and *Mattz* decisions, and that the legal principles established and affirmed in the latter cases still represented valid law. The Court offered the following analysis with respect to the *Mattz* case:

> In *Mattz*, [we] held that an 1892 Act of Congress did not terminate the Klamath River Reservation in northern California. That Act declared the reservation lands 'subject to settlement, entry, and purchase' under the homestead laws of the United States, empowered the Secretary of the Interior to allot tracts to tribal members, and provided that any proceeds of land sales to settlers should be placed in a fund for the tribe's benefit. The 1892 statute could be considered a termination provision only if continued reservation status was inconsistent with the mere opening of lands to settlement, and such is not the case.... *But the 1891 Act before us is a very different instrument. It is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. The 1891 Act does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain—$2.50 per acre—in payment for the express cession and relinquishment of 'all' of the Tribe's 'claim, right, title and interest' in the unallotted lands. The statute in Mattz, by contrast, benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its lands to settlers.* [Emphasis added.]

Id. at 447-8, 43 L.Ed.2d at 316.

The Court distinguished the *Seymour* case in similar fashion:

> In Seymour, the Court held that a 1906 Act of Congress did not terminate the southern portion of the Colville Indian Reservation in Washington. *Like that in question in Mattz, this Act was unilateral in character; like that in question in Mattz, it merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit. The Seymour Court was not confronted with a straightforward agreement ceding lands to the Government for a sum certain. . . .*
>
> Thus, in finding a termination of the Lake Traverse reservation, we are not departing from, but following and reaffirming, the guiding principles of Mattz and Seymour. [Emphasis added.]

Id. at 448-9, 43 L.Ed.2d at 316.

The legal principles clearly articulated by this Court in the *Seymour, Mattz,* and *De Coteau* cases plainly require the conclusion that the Court of Appeals erred in holding below that the 1904, 1907, and 1910 surplus land acts disestablished petitioner's reservation in Gregory, Tripp, and Mellette Counties in South Dakota. Nowhere in any of the three surplus land statutes at issue in this case is "... clear termination language ... employed", and, in light of this fact, the Court of Appeals should not have inferred "... an intent to terminate the reservation."[8]

[8]Despite the lack of explicit termination language in the 1904, 1907, and 1910 Acts, the court below found material in the statutes and their legislative history from which it inferred an intent by Congress to disestablish parts of the Rosebud Indian Reservation. *See, e.g., Rosebud Sioux Tribe v. Kneip,* No. 74-1211 (8 Cir. 1975) (slip opinion of July 16, 1975), at 25-32. The errors in the Court of Appeals' legislative analysis have been documented

[footnote continued]

Mattz v. Arnett, 412 U.S. at 504, 37 L.Ed. at 106. *Accord, Seymour v. Superintendent,* 368 U.S. at 355, 7 L.Ed.2d at 349; *United States v. Celestine,* 215 U.S. at 285, 54 L.Ed. at 197. Furthermore, the 1904, 1907, and 1910 Acts, which did no "... more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards," should not be construed as effecting disestablishment of petitioner's reservation. *Seymour v. Superintendent,* 368 U.S. at 356, 7 L.Ed.2d at 349. To the contrary, such legislation is fully compatible with continued reservation status. *Mattz v. Arnett,* 412 U.S. at 496-97, 37 L.Ed.2d at 101-02.

More important, nothing said by the Court in the *De Coteau* case alters in any way the conclusions set forth above. In contrast to the cession statute which was at issue in that case, the surplus land acts in question here were "unilateral action by Congress" and not the "ratification of a previously negotiated agreement to which a tribal majority consented." *De Coteau v. District*

in detail in petitioner's brief, and therefore will not be repeated here.

To summarize briefly, however, the inescapable conclusion is that the lower court simply ignored certain legislative material relating to the 1904, 1907, and 1910 Acts which plainly evinces a Congressional intent not to disestablish petitioner's reservation. Furthermore, the Court of Appeals demonstrated a marked proclivity for resolving ambiguities in the legislative history of the land surplus statutes against petitioner—in direct contravention of the established legal principle that such ambiguities are to be resolved in favor of Indian tribes. *Compare Rosebud Sioux Tribe v. Kneip,* No. 74-1211 (8 Cir. 1975) (slip opinion of July 16, 1975), at 31, 42, 56 *with Squire v. Capoeman,* 351 U.S. 1, 100 L.Ed.883 (1956); *Carpenter v. Shaw,* 280 U.S. 363, 74 L.Ed.478 (1930); *Choate v. Trapp,* 224 U.S. 665, 56 L.Ed.941 (1912).

County Court, 420 U.S. at 448, 43 L.Ed.2d at 316. The 1904, 1907, and 1910 Acts did "merely open lands to settlement", and they did not "[appropriate and vest] in the tribe a sum certain . . . in payment for the express cession and relinquishment of 'all' of the Tribe's 'claim, right, title and interest' in the unallotted lands."[9] *Id.* at

---

[9]The 1904 Act, which purports to ratify a "modified agreement" entered into between petitioner and the United States does on its face contain language of cession. Article I provides that "[t]he said Indians belonging on the Rosebud Reservation . . . for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota. . . ." Act of April 23, 1904, ch. 1484, 33 Stat. at 256.

To conclude, however, on the basis of the language quoted above that the 1904 Act was a cession statute would represent the proverbial elevation of form over substance. As the historical record clearly demonstrates, the "agreement" ratified by the 1904 Act never was consented to by the Rosebud Sioux Tribe. *See* S. REPT. NO. 651, 58th Cong., 2d Sess. (1904); H. REPT. NO. 443, 58th Cong., 2d Sess. (1904). Furthermore, Congress made no pretense in the statute about paying a sum certain for petitioner's land, but instead promised only that the proceeds from whatever sales took place would be credited to the Rosebud Sioux Tribe. *See* Act of April 23, 1904, ch. 1484, §6, 33 Stat. at 258. Thus, whatever its form may have been, in substance the 1904 Act plainly constituted a unilateral land surplus statute, and not the ratification of a bilateral agreement pursuant to which petitioner agreed to cede parts of its reservation.

The Court of Appeals recited at great length below that the only difference between the 1901 Agreement, which petitioner concedes would have effected a cession of its lands in Gregory County, and the 1904 Act is that the latter document altered only the "form of payment" specified in the former. *See Rosebud Sioux Tribe v. Kneip*, No. 74-1211 (8 Cir. 1975) (slip opinion of July 16, 1975), at 33-37. Completely apart from other important differences between the 1901 Agreement and the 1904 Act which the lower court failed to recognize, the above-mentioned line of

[footnote continued]

448, 43 L.Ed. at 316. To the contrary, the surplus land statutes affecting petitioner's reservation "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its lands to settlers." *Id.* at 448, 43 L.Ed.2d at 316. Under these circumstances, petitioner's reservation plainly was not disestablished by the surplus land acts of 1904, 1907, and 1910.

CONCLUSION

The Court of Appeals erred in holding that the Gregory, Tripp and Mellette County portions of the Rosebud Reservation were disestablished by the 1904, 1907, and 1910 Acts. The Acts did not represent the ratification of an agreement previously negotiated between the United States and the Rosebud Sioux Tribe, but instead were actions taken by Congress unilaterally and without the consent of petitioner. Furthermore, the legislation merely opened certain lands within the boundaries of the Rosebud Reservation to settlement by non-Indians, and did not represent a cession of the Rosebud Tribe's title to the lands made available for sale. *See Ash Sheep Co. v. United States*, 252 U.S. 159, 64 L.Ed. 507 (1920). None of the surplus land statutes in question in this case provided that petitioner would receive a sum certain for any of the lands opened for settlement, but instead offered only the vague assurance that proceeds from future sales would be utilized for the Tribe's benefit. This Court long has held that such

---

reasoning misses the critical point—namely, that the change in form of payment, coupled with the lack of petitioner's consent to the change, means that the 1901 Agreement was transformed into a unilateral surplus land statute. *See De Coteau v. District County Court*, 420 U.S. at 448, 43 L.Ed.2d at 316.

legislation does not effect the disestablishment of an Indian reservation.

For these reasons, *amici curiae* urge the court to grant the petition for certiorari.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Attorney for Amici Curiae.

Of Counsel:
W. RICHARD WEST, JR.